IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12428 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

EXECUTIVE ENGINEER (MECHANICAL)

Versus

GHANSHYAMSINH J GOHEL

Appearance:

MS SEJAL K MANDAVIA for Petitioner Nos. 1-2

MR MURALI N DEVNANI for the Respondent.

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 14/11/2003

ORAL JUDGEMENT

1. The petitioner, Gujarat Maritime Board, has, by way of this petition, challenged the Award passed by the Labour Court, Bhavnagar, dated 23.7.2000, in Reference (LCB) No.54 of 1994.

The respondent-workman has raised the aforesaid Industrial Dispute for reinstatement in service, with all consequential benefits.

2. The case of the workman is that he was appointed as a Store Clerk in the Store Department on 3.10.1991 and he had continuously served since 2.11.1991. He was paid a monthly salary of Rs.1,875/- and he was discharging his duties as a Store Clerk. It is also his case that the post in question is permanent in nature and even though, he was discharging his service regularly and continuously, yet, he was given regular breaks after 29 days for a day and, thereafter, fresh orders were issued to him from time to time on 29 days basis. It is also his case that such breaks are is artificial as he was discharging his duties continuously. It is also his case that since he was demanding payment for certain days for which he discharged duties, the Department kept prejudice against him and, therefore, by way of oral termination dated 9.8.1993, his services were terminated, which, according to him, is not a bona fide action. Under the circumstances, an Industrial Dispute was raised by the workman. Ultimately, the Labour Commissioner, Bhavnagar, referred the said matter for adjudication to the Labour Court, Bhavnagar and the said matter was numbered as Reference (LCB) No.54 of 1994.

3. Before the Labour Court, a stand was taken by the Management to the effect that the concerned workman had no right to the post as he was given appointment order for 29 days. It was also averred by the employer that the concerned workman was appointed only for doing temporary work and now, the said work is not available and, therefore, in view of the fact that the services of the concerned workman is no longer required, his services were terminated by way of oral termination. Under the circumstances, it was prayed before the Labour Court that the reference was required to be rejected.

4. The Labour Court, Bhavnagar, ultimately, after hearing the arguments of both the sides and after considering the evidence on record, allowed the said Reference and directed the Board to reinstate the concerned employee on his original post, with continuity of service and all other consequential benefits. It is this Award of the Labour Court, Bhavnagar, which is impugned at the instance of the petitioner-Board in this petition.

5. This petition, though, styled as "under Articles 226 and 227 of the Constitution of India", as such, it is

under Article 227 of the Constitution of India and, this Court, therefore, is required to consider whether the order passed by the Court suffers from any infirmity or any illegality.

6. Ms.Mandavia, learned Advocate for the petitioner-Board, vehemently submitted that since the respondent was appointed on a fixed period, he has no right to the post and the provisions of Section 25-F of the Industrial Disputes Act are not applicable. Ms.Mandavia further submitted that the respondent was appointed only on 29 days basis and, therafter, the Board decided not to renew the said contract by giving fresh orders and, therefore, in view of Section 2(oo)(bb) of the Act, it cannot be said that the action of the Management is illegal as the action of the management will not amount to retrenchment in view of the said fact.

7. Mr.Devnani, learned Advocate for the respondent, on the other hand, submitted that the Labour Court, after appreciating the evidence on record, has reached the conclusion that the action of the Management is illegal and improper. He further submitted that since he has already completed 240 days by virtue of such temporary orders, provisions of Section 25-F were required to be followed by the Management before passing the impugned order.

8. In this connection, certain factual aspects are required to be taken into consideration. It is required to be noted that the respondent, though appointed by way of temporary orders for 29 days, such orders are given to him from time to time regularly, with an artificial break of about one day. During the aforesaid process of such tenure appointment orders, the respondent has, admittedly, served for more than 240 days, as he was initially appointed on 3.10.1991 and, ultimately, his services were put to an end by oral termination order on 9.8.1993.

9. At this sage, reference is also required to be made to the evidence led by the Management itself. One Mr.Navnitkumar Vyas, who was serving at the relevant time as en Executive Engineer, has admitted, in his cross-examination, which is at page 32 in the compilation that the work in the concerned Store, i.e. Athwada, is going on. However, he has stated in his cross-examination that the concerned workman was taken in service for the purpose of pending work. He has also stated that one Majithia is appointed in connection with the work of the Store.

10. On behalf of the Management, another witness, viz., one Niranjanbhai Rajpura, was examined. His evidence was also produced at page 34. He has stated in his chief-examination that the respondent was appointed as a work charged employee. He has also stated in his chief examination that after 30th July, 1993, no person was taken on work charge basis, but, subsequently, i.e. after the aforesaid date, other 2 to 3 persons were appointed as work charged employees. This part of the evidence is finding its place in the Chief Examination of the witness of the petitioner-Management. In the concluding part of his evidence at page 35, he has stated that it is true that even if there is a break of one day, the services of the employee were continued continuously. He has stated that the nature of the work is of a permanent nature. In view of this clear admission on the part of the witness of the petitioner-Management itself, and after appreciating the aforesaid evidence on record, the Labour Court has come to the conclusion that the action of the petitioner-Management in terminating the services of the employee is illegal and, therefore, the impugned order of reinstating the workman was passed by the Labour Court.

11. Considering the evidence on record, as referred to above, which is appreciated by the Labour Court, it is not possible for this Court to come to a different conclusion than the one which is arrived at by the Labour Court while deciding the reference. While deciding the matter under Article 227 of the Constitution of India, this Court is not required to re-appreciate the evidence; yet, I have gone through the evidence again and I have referred to the aforesaid admission, which is made by the witnesses of the Board itself. It is no doubt true that if a person has been appointed either on a particular project work, or has been appointed by way of a tenure appointment for a fixed period, in such cases, provision of retrenchment is not required to be complied with in view of Section 2(oo)(bb) of the I.D. Act. However, it is required to be noted that, in the instant case, even though the work for which the respondent was appointed was found to be of a permanent nature as per the evidence on record, and even after the initial orders of 29 days, all throughout, for a considerable period, which is exceeding 240 days, the respondent's services were continued. While considering the aforesaid factual aspect of the matter, it cannot be said that the Management has exercised its powers under the aforeaid provisions of Section 2(oo)(bb) of the Act. It is, therefore, not open for the Management to take shelter of

such tenure appointment orders only with a view to depriving the employee of the benefit of Section 25F of the ID Act.

A Division Bench of this Court, consisting of Dharmadhikari, C.J., as His Lordship then was, and myself, has dealt with an identical case in Surat Mahila Nagrik Sahakari Bank Ltd. v. Mamtaben Mahendrabhai Joshi, 2002(1) GLR 755. In the said case, fixed term appointment orders were given from time to time, for a period extending beyond 240 days. The Management-Bank terminated the services of the respondent-employee even though work was of a perennial nature. The services of the employee were terminated on the alleged ground that her work not satisfactory, which, according to the Court, remained unsubstantiated. The Management Bank took up a contention that in case of fixed term appointment, there was no need to comply with the requirements of Section 25-F of the I.D. Act. Upholding the order of the Labour Curt, setting aside the order of termination, it was held by this Court that provisions of Section 25F cannot be brushed aside when order of termination is found to be a case of victimisation and unfair labour practice. In paragraph 27, this Court held as under :-

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27. Considering the various case law and considering the facts of the case, especially when we have gone through the evidence, which was led by the parties, we are of the opinion that the respondent employee was given tenure appointment orders from time to time for a long period, which extended beyond 240 days. It is no doubt true that the respondent has not specifically pleaded that the power exercised by the Management was nothing but a colourable exercise of power. However, the facts of the case as well as the evidence on the record clearly establish that such temporary orders were given from time to time and, therafter, the services of the respondent were terminated even though the work in question was still in existence. There is nothing on record to show that such work was not in existence at the relevant time when her services were terminated. In fact, at the time of argument, Mr.Patel himself has stated that if her work were found to have been satisfactory, she would have been given permanent appointment. Therefore, it is not possible to believe that since the work, for

which she was appointed, was not in existence, her services were not continued further. In so far as the unsatisfactory work is concerned, there is absolutely no reliable material for coming to the conclusion that her work was not satisfactory. Few orders on which reliance was placed by Mr.Patel do not inspire confidence to reach the conclusion that really, the work of the concerned employee was not satisfactory. In our opinion, it is not open for the Management to take the benefit of the nature of appointment order, i.e. tenure order, with a view to depriving the employee the benefit available under the Industrial Law. This is not a case, wherein only for a fixed type of work, like a Project, etc., an appointment is given and on completion of such work or project, the services of such employee is not required any further. On the contrary, the respondent-employee could have been continued in service even as per the say of Mr.Patel, if her services were found to be satisfactory. That shows that the work in question is still available and other similarly situated employees, who were appointed with the respondent, have been continued in service by the Management.

In fact, to continue a person for a very long time under temporary orders may amount to Unfair Labour Practice within the meaning of the Fifth Schedule of the Industrial Disputes Act, 1947. Clause 10 of the Fifth Schedule lays down that employment of workmen as "badlis", casuals or temporaries and continuing them as such for years, with the object of depriving them of the status and privileges of permanent workmen, may amount to Unfair Labour Practices. The Industrial Court, Surat, in appeal, has considered in paragraph 14 of its order, various appointment orders, which are 16 in number. The appellate court has observed that with a break of one or two days, fresh orders were used to be given to the respondent. The Court has also considered the evidence of the Management, wherein the Bank Manager has said that she cannot state whether any other employees have been continued in service after the termination of service of the respondent. The Industrial Court has not believed the evidence of this Bank Manager on the ground that it is difficult to believe that she is not aware about the aforesaid

facts even after serving since 20 years. The Industrial Court has also found in the said paragraph that one Ashaben Pachhigar, who was also given temporary appointment from 8.1.1991 to 7.2.1991, was the sister-in-law of the Manager of the Bank and the said Ashaben was made permanent. Mention is made by the Industrial Court in paragraph 14 of the judgment about similar types of appointments given to others. Considering the aforesaid benefit given to other similarly situated employees as well as considering the fact that the work in question was of a permanent nature, and the employees similarly appointed with the present respondent and even subsequently appointed, have also been made permanent, the Industrial Court has found that the action of the Management was deliberate and intentional not to give status of permanency to the present respondent with an object of depriving her the benefit of law. Under these circumstances, the appellate court has given a finding of fact that the action of Management is not bona fide and by keeping prejudice, she has not been given appointment in order to provide employment to others and that the work in question has continued even after the termination of service of the respondent. Considering the totality of the evidence, therefore, the Industrial Court has given detailed reasons starting from paragraph 14 onwards. It is no doubt true that the applicant, in her application or even in her approach letter before filing the application to the Court or in her evidence, has not clearly stated that the action in question is by way of colourable exercise of power. Still, the appellate court has considered the benefit given by the Bank to others and has also come to the conclusion that this is a case of victimisation, as observed in the concluding part of paragraph 14 of the order. Therefore, it is not possible for us to believe that the learned single Judge has given the said finding even though there is absolutely no evidence on the record, because, ultimately, the reasoning of the Industrial Court also is on the same line. Therefore, once it is found by the fact finding court, i.e. the Industrial Court, that the order in question is not bona fide and that it is passed by way of victimisation and the said reasoning is based on appreciation of evidence and when attention of the parties is focussed on this question, it cannot be said that

the said finding of fact is based on no evidence or that the point is wrongly decided even though it was not in issue before the Court. In that case, even if there is no specific issue and if the evidence is already available on the record, such finding cannot be said to be vitiated. While exercising extraordinary powers under Article 226 of the Constitution of India, therefore, it is not possible for this Court to set aside the aforesaid finding of fact, and it cannot be said that the same is without any foundation worth the name. Though it is, no doubt, true that in case of a fixed term appointment, in view of Section 2(oo)(bb), the provisions of Section 25-F may not have any application, the Court, exercising powers under the Industrial Disputes Act, can very well go into the questions whether the powers are exercised bona fide, whether it is by way of victimisation or whether it is passed solely with the object of depriving the employee the benefit available under the Industrial Disputes Act. It cannot be said that even if the order is passed by way of victimisation or in an arbitrary manner, or even if it is an unfair labour practice, then also simply because the appointment is for a fixed term, provisions of Section 25-F are not to be looked into at all. In our view, therefore, the said provision cannot be brushed aside if it is brought to the notice of the Court that the order in question was passed by way of victimisation or has not been passed with a bona fide intention. When the appellate court has specifically come to the conclusion, on appreciation of the evidence, it would hardly make any difference whether the concerned employee has pleaded that case in her application or not.

As stated earlier, certain facts are not in dispute that various appointment orders of temporary nature were issued from time to time to the respondent and similar orders were issued to other employees and, thereafter, even persons junior to the respondent were made permanent, coupled with the fact that there is no material except some few lines written in some of the temporary orders that the employee may increase her speed of work, and from the same, ipso facto, it cannot be said that her work was not satisfactory during the temporary period and,

> therefore, the action of not continuing her in service was not a bona fide and genuine action. Therefore, in our view, it is not open for the appellant to take benefit of tenure appointment unless such action is found to be reasonable, bona fide and genuine. The material on the record do not satisfy our conscience that the non-continuance of the respondent in service was bona fide. In view of the positive finding given by the appellate court, we are not in a position to accept the say of Mr.Patel, and as stated earlier, said provision of Section 2(oo)(bb) cannot be made applicable in all cases, where, based on evidence, it is found that the action of the employer is by way of victimisation or, in any case, is not bona fide.
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> ... ..."

In the instant case, the concerned workman has already stated in his application that even during period when he was given the break, work was taken from the respondent and when he demanded salary for the said period, by way of victimisation, his services wee terminated by way of oral termination. Accordingly, considering the factual aspect of the matter and considering the evidence on record, in my view, it cannot be said that the Labour Court has committed any error of law or of jurisdiction in passing the impugned order stating that the termination order is illegal and is in violation of Section 25F of the I.D. Act. The said order of the Labour Court, therefore, is not required to be interfered with by this Court in exercise of its extraordinary jurisdiction under Article 227 of the Constitution of India. I, therefore, do not find any substance in so far as the grievance of the petitioner as regards the order of reinstatement passed by the Labour Court is concerned.

12. It is next argued by Ms. Mandavia that the respondent is required to be continued only on temporary tenure post as the Board has no power to make any appointment except tenure appointment and, accordingly, the respondent is now required to be given only tenure appointment orders. She submitted that, today, even the work is not available. She submitted that considering the said aspect and considering the fact that during the intervening period, the said work was not available, the respondent was not given further orders. Considering this aspect of the matter, order granting back wages may

be set aside.

Mr.Devnani, on the other hand, submitted that as per the finding of the Labour Court, even the Management has appointed some work charged employees, later on, and he submitted that simply because the matter took considerable time before the Labour Court for adjudication is no ground for denying back wages to the respondent.

Since either side has not led any positive evidence whether the concerned workman was gainfully employed or not, and considering the fact that considerable time has passed in between and considering the fact that during the pendency of the petition, the workman was given the benefit of Section 17-B of the I.D. Act, as well as considering the fact that even if the order of reinstatement is passed, the Court is not bound to order payment of 100% back wages for the entire intervening period, i.e. upto the judgment of the Labour Court, as it depends upon the facts and circumstances of each case, the respondent workman shall be entitled to, in all, Rs.25,000/-. It is, however, clarified that the respondent shall be entitled to continuity of service so far as seniority and other benefits are concerned, but so far as liability regarding payment of back wages is concerned, the petitioner shall pay Rs.25,000/-, in all, towards back wages, and the respondent shall not be entitled to any other amount. It is further clarified that from the date of the Award of the Labour Court, the respondent shall be entitled to reinstatement as well as the benefit as per the Award of the Labour Court. It is, however, clarified that the respondent is required to be reinstated on his original post and in the same manner in which he was allowed to serve when he was serving. At the time of making the payment of Rs.25,000/-, the amount which is already paid to the workman towards Section 17-B of the I.D. Act is to be adjusted and the remaining amount after such adjustment is to be paid.

13. Rule is accordingly partly made absolute. Petition is accordingly allowed partly. No costs.

14th November, 2003 (P.B. Majmudar, J.)

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(apj)